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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER CARLOS CARBAJAL, Defendant and Appellant.	E039522 (Super.Ct.No. FSB040181) OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Peter Quon, Jr., Supervising Deputy Attorney General, and Quisteen S. Shum, Deputy Attorney General, for Plaintiff and Respondent.

Following a jury trial, defendant Christopher Carlos Carbajal was convicted of second degree murder (Pen. Code,[1] § 187, subd. (a)). The jury also found true the allegation that defendant personally used a deadly and dangerous weapon, a knife, within the meaning of section 12022, subdivision (b)(1). Defendant was sentenced to state prison for a total indeterminate term of 16 years to life. He appeals, contending (1) the trial court erroneously instructed the jury on the element of malice required to sustain a conviction for second degree murder; (2) the trial court erroneously instructed the jury that it could not return a verdict on the lesser offense of voluntary manslaughter unless it first unanimously acquitted defendant of murder; (3) the trial court erred in its instructions to the jury when it repeatedly phrased the offense of manslaughter in terms of reducing homicide from murder to manslaughter; and (4) the cumulative error doctrine applies.

I. FACTS

On July 1, 2003, Alexis Pintado (victim), accompanied by her brothers, Daniel DeLara and Christopher Pintado, dropped off her six-month-old daughter at the home of defendant's mother. Defendant is the child's father. Defendant, who was not supposed to be there, was standing on the front porch. As the victim was walking to the porch, defendant began yelling at her for leaving him. The victim was scared and walked back to her car. Meanwhile, defendant went inside the house and shut the front door.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

The victim took the child out of the car and put the diaper bag over her shoulder. She told DeLara not to worry and that she was just going to let the child visit with defendant's mother. Carrying the child in her car seat, the victim placed the child on the porch and knocked on the door. Defendant charged out of the house at the victim. Defendant had a knife in his right hand behind his back. As the victim was backing away, going down the porch steps, defendant grabbed her hair with his left hand and pulled her to the ground onto her back. The victim was crying and had her hands up in the air. Defendant bent over her and thrust the knife into the back side of her left leg. The victim's left leg popped up and she screamed. Defendant stood over her, pulled out the knife, brought her to her feet by pulling her hair, and then looked around like he did not know what to do. Blood was gushing out of the victim's leg. DeLara immediately drove to the police station located around the corner.

Karen Rodriguez, a neighbor, saw defendant carrying the victim, who was crying and screaming, into his house. Rodriguez walked outside to check her mailbox. Defendant came back outside, used a water hose to wash the blood off the porch, and told Rodriquez to help him. Rodriguez and her friend, Kimberly Dang, followed defendant into his mother's house and saw the victim lying on the floor of the living room, bleeding.

A call was placed to 911. When the police arrived, defendant told Rodriguez to "take care of [his] girl," that he had to "bum out," and then he ran out the back door.

The victim died from a single, two-inch-deep stab wound to the back of her left thigh, which punctured the femoral artery and caused her to bleed to death within minutes.

Defendant did not testify. Instead, through examination of the prosecution's witnesses, he presented a defense that he did not intend to kill the victim, and that he stabbed her one time in the thigh because of the rage and anger he felt from her leaving him. Thus, defendant argued that he committed a manslaughter, not a murder.

II. INSTRUCTION ON ELEMENT OF MALICE

Defendant contends his conviction must be reversed because he was denied due process when the trial court erred in instructing the jury on the element of malice that is required to sustain a conviction for murder. He claims the court's instruction omitted the requirement that in order to establish the requisite element of malice to sustain a murder conviction, the prosecution had to prove the absence of provocation beyond a reasonable doubt. Acknowledging that the jury received the correct instruction in written form, defendant maintains that this did not cure the error in the oral instructions.

Preliminarily, respondent notes that defendant did not raise any objection to the trial court's oral instruction, and thus has forfeited his claim on appeal. (*People v. Arias* (1996) 13 Cal.4th 92, 171.) Nonetheless, respondent addresses the merits of the issue and argues that it lacks merit because, inter alia, the court's reading of the instruction did not amount to error. We agree with respondent.

"In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. [Citation.]" (*People v.*

Koontz (2002) 27 Cal.4th 1041, 1085.) Murder, other than felony murder, requires malice. Manslaughter does not. An intentional and unlawful killing lacks malice and is the lesser included offense of voluntary manslaughter, if it is committed in a "sudden quarrel or heat of passion" or in imperfect self-defense. (§ 192, subd. (a); *People v. Rios* (2000) 23 Cal.4th 450, 460-461.) In a murder case where the evidence suggests the killing may have occurred in the heat of passion or in imperfect self-defense, the prosecution has the burden of showing beyond a reasonable doubt that these circumstances were lacking in order to establish the murder element of malice. (*People v. Rios, supra,* at pp. 461-462.) "[W]here the evidence warrants, a murder jury must hear that provocation or imperfect self-defense negates the malice necessary for murder and reduces the offense to voluntary manslaughter." (*Id*. at p. 463, fn. 10.)

Here, defendant was charged with murder. The trial court instructed the jury on both murder and manslaughter. The court instructed the jury pursuant to CALJIC No. 8.50 ("Murder and Manslaughter Distinguished"), which distinguishes murder from manslaughter. When reading the instructions to the jury, the trial court stated:

"The distinction between murder and manslaughter is that murder requires malice while manslaughter does not.

"When the act causing the death, though unlawful, [i]s done in a heat of passion or is excited by a sudden quarrel that amounts to adequate provocation, the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice which is an essential element of murder is absent.

"*To establish that a killing is murder, not manslaughter, the People -- excuse me -- the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that if the act which caused the death was not done in the heat of passion or upon a sudden quarrel to constitute murder or manslaughter, there must be, in addition to the death of a human being, and [sic] unlawful act which was a cause of that death*." (Italics added.)

Additionally, the jurors were provided with a written copy of CALJIC No. 8.50, which provides:

"*The distinction between murder and manslaughter is that murder requires malice while manslaughter does not*.

"When the act causing the death, though unlawful, is done in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation, the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent.

"*To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel*." (Italics added.)

Although the oral version of CALJIC No. 8.50 was not a word-for-word recitation of the written version, we agree with respondent that it did inform the jury of the prosecution's burden of proof. The oral version of the instruction explained that the prosecution had to prove beyond a reasonable doubt each of the elements of murder, and

that the act causing death was not done in the heat of passion. The oral version also explained that in the event the prosecution failed to prove the act causing death was not done in the heat of passion or upon sudden quarrel, the prosecution had to prove beyond a reasonable doubt there was an unlawful act that caused the victim's death. However, this additional instruction does not mean the trial court failed to instruct orally on the prosecution's burden of proving beyond a reasonable doubt that the death was not caused by a heat of passion. Thus, we reject defendant's claim to the contrary.

Notwithstanding the above, even if we assume error in the reading of CALJIC No. 8.50, we find such error to be harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) "Conflicting instructions or instructions that misdescribe an element of an offense are harmless 'only if "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" [Citation.] "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."' [Citations.]" (*People v. Jeter* (2005) 125 Cal.App.4th 1212, 1217.)

As defendant admits, the jury received the correct version of CALJIC No. 8.50 in written form. Also, the trial court admonished the jury, pursuant to CALJIC No. 17.45 ("Manner of Recording Instruction of No Significance−Content Only Governs"), that all of the instructions would be made available in written form for its deliberations and that "[e]very part of the text of an instruction, whether typed, printed or handwritten, is of equal importance" and that the jury was to be "governed only by the instruction in its

final wording." We presume that juries read and understand the written instructions. (*People v. Osband* (1996) 13 Cal.4th 622, 687 [when erroneous oral instructions are supplement by correct written ones, and the court instructs with CALJIC No. 17.45, there is a presumption the jury was guided by the correct written ones]; *People v. Crittenden* (1994) 9 Cal.4th 83, 138; *People v. Garceau* (1993) 6 Cal.4th 140, 189-190, disapproved on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) Thus, absent a showing to the contrary, any error resulting from the oral instruction of the prosecution's burden of proof was cured by the written version.[2]

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[2] Defendant argues that the written instructions did not cure the error. In support of this argument, he cites to the following cases: *United States v. Jackson* (9th Cir. 1995) 72 F.3d 1370, 1383-1384; *People of the Territory of Guam v. Marquez* (9th Cir. 1992) 963 F.2d 1311, 1314; *United States v. Noble* (3d Cir. 1946) 155 F.2d 315, 318; *Carrau v. Marvin Lumber & Cedar Co.* (2001) 93 Cal.App.4th 281, 296; *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107-1108; and *People v. Brew* (1991) 2 Cal.App.4th 99, 106. We find defendant's reliance on these cases misplaced.

First, as respondent points out, while federal circuit court decisions may be persuasive, they are not binding on state courts. (*People v. Camacho* (2000) 23 Cal.4th 824, 830, fn. 1.) In contrast, we are required to follow the decisions of our state's highest court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) As we have already noted, when the trial court supplements erroneous oral instructions with the correct written ones, and the court instructs with CALJIC No. 17.45, there is a presumption the jury was guided by the correct written ones. (*People v. Osband*, *supra*, 13 Cal.4th at p. 687; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 138; *People v. Garceau*, *supra*, 6 Cal.4th 140.)

Second, the state appellate decisions cited by defendant are distinguishable. In *People v. Murillo*, *supra*, 47 Cal.App.4th 1104, the trial court omitted CALJIC No. 2.21.2 (Witness Willfully False) from its oral reading. When the fact was called to the court's attention, the court did not recall the jury for additional oral instruction. Instead, over defendant's objection, it merely included the instruction in the written packet given to the jury. The error was in the trial court's failure to read the instruction it had said it would use. (*People v. Murillo*, *supra*, 47 Cal.App.4th at pp. 1106-1107.) In *People v. Brew*, *supra*, 2 Cal.App.4th at pp. 105-106, the trial court failed to instruct the jury on a lesser

[footnote continued on next page]

Moreover, we note that the defense counsel's closing argument reinforced the written version of CALJIC No. 8.50. During closing argument, counsel implored the jury to hold the prosecutor to her burden of proof, emphasizing that she had to prove the victim's death was not the result of defendant's heat of passion. Defense counsel stated: "You heard one of the jury instructions for heat of passion. . . . [¶] . . . [¶] . . . One of the key things is that the District Attorney has to prove beyond a reasonable doubt that this death was not caused by heat of passion. [¶] She made elements of second degree murder. Doesn't matter. She has to prove that heat of passion is not what happened here." When finishing his argument, defense counsel repeated: "The District Attorney has not proved the element of murder. What I am asking you to do is . . . hold the District Attorney to her burden. She needs to prove all of the elements of murder. She needs to prove that this unlawful death was not a result of heat of passion." The prosecutor did not refute her burden as set out by defense counsel: "Ladies and gentlemen, the defense attorney is correct. You should follow the law, and when you follow the law, you find murder."

Based on the above, we reject defendant's claim of prejudicial error regarding CALJIC No. 8.50.

[footnote continued from previous page]
included offense. Contrary to these cases, this case did not involve the failure to give orally a requested instruction or the failure to instruct on a lesser included offense.

III. INSTRUCTION ON ACQUITTAL-FIRST RULE

Defendant contends the trial court erroneously instructed the jury that it could not return a verdict on the lesser voluntary manslaughter offense unless it unanimously acquitted defendant of murder. (CALJIC No. 17.10.) This is commonly referred to as the acquittal-first rule. Respondent argues that this argument has been waived, and in any event, lacks merit. We need not address the waiver argument because we agree that defendant's contention fails on the merits.

Defendant acknowledges that the California Supreme Court in *People v. Fields* (1996) 13 Cal.4th 289, 310-311, held that the acquittal-first instruction is proper. Defendant, however, states that we "should urge the Supreme Court to reconsider the holding . . . ." He claims that the instruction violates constitutional due process and jury trial guarantees because it encourages false unanimity and coerced verdicts.

This issue has been considered multiple times by the California Supreme Court and decided against defendant: "Defendant contends that CALJIC No. 17.10, the jury instruction that requires a unanimous acquittal of the charged offense prior to a verdict on a lesser offense, violated his due process and Eighth Amendment rights to a full jury consideration of lesser offenses. This precise issue has been repeatedly rejected by this court. (See, e.g., *People v. Dennis* (1998) 17 Cal.4th 468, 535-537 . . .; *People v. Fields* [*supra*,] 13 Cal.4th [at pp.] 303-305. . . .) We see no reason to revisit the issue here." (*People v. Cox* (2003) 30 Cal.4th 916, 967; see also, *People v. Jurado* (2006) 38 Cal.4th 72, 125.)

In his reply brief, defendant argues that our state's highest court should revisit this issue because "none of [its] decisions on this issue . . . cite to, or reference, the out-of-state decisions in *Cantrell v. State* (G[a.] 1996) 469 S.E.2d 660, 662 [acquittal-first instruction 'gives the prosecution an unfair advantage'] and *People v. Helliger* (N[.]Y[.] 1998) 691 N[.]Y.S.2d 858, 865 [acquittal-first rule is based on 'the desire to avoid lending encouragement to jurors who are irrationally holding out for a lesser charge' while at the same time the rule 'lends support to jurors who are irrationally holding out for a greater charge'], which soundly criticize and reject the rule." However, the decisions in *Cantrell v. State, supra*, and *People v. Helliger, supra*, existed at the time our highest court reaffirmed its decision in *People v. Fields*, *supra*, 13 Cal.4th 289. (*People v. Cox, supra*, 30 Cal.4th 916; *People v. Jurado, supra*, 38 Cal.4th 72.) Thus, we presume that our high court was aware of such decisions based on its own research or that of appellate defense counsel. Clearly, by reaffirming its decision in *People v. Fields*, our high court rejected these out-of-state decisions without comment.

IV. USE OF TERM "REDUCE" IN MANSLAUGHTER INSTRUCTIONS

The trial court instructed the jury pursuant to CALJIC Nos. 8.42 ("Sudden Quarrel or Heat of Passion and Provocation Explained") and 8.43 ("Murder or Manslaughter−Cooling Period"). On appeal, defendant argues that these instructions created a presumption that homicide is murder rather than manslaughter and thus infringed on his right to trial by jury because they set the order of deliberations for the jury. Defendant claims that by repeatedly phrasing the offense in terms of reducing homicide from murder to manslaughter, the jury was erroneously instructed. Respondent

contends the instructions were not erroneous, but if there was error, defendant waived his claim on appeal by failing to object at the trial level. We need not address the waiver issue because, as we discuss below, "[e]ven if the claim is not barred, defendant's claim clearly is untenable on the merits." (*People v. Catlin* (2001) 26 Cal.4th 81, 150.)

Defendant argues that the language of CALJIC Nos. 8.42 and 8.43 created a presumption that a homicide is murder unless proven otherwise that it is voluntary manslaughter because both instructions refer repeatedly to reducing a killing from murder to manslaughter. Defendant further argues that this purported presumption lessened the prosecution's burden of proof. In support of this argument, defendant cites *People v. Owens* (1994) 27 Cal.App.4th 1155, 1158-1159, which held that the reference in CALJIC No. 10.42.6 to "evidence 'tending to prove' [defendant's] guilt carries the inference that the People have, in fact, established guilt." (*People v. Owens, supra*, 27 Cal.App.4th at p. 1158.) However, the court went on to state, "In light of the entire body of instructions, it is not reasonably likely that [the erroneous instruction] misled the jury on the reasonable doubt standard." (*Id.* at p. 1159.)

Here, the court instructed the jury, in addition to the challenged instructions, with CALJIC No. 8.50, setting forth the distinction between murder and manslaughter. That instruction also emphasized the burden on the prosecution "to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done [in the heat of passion or upon a sudden quarrel] [or] [in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury]." (CALJIC No. 8.50.) The trial court further instructed the jury under

CALJIC No. 8.72 that it must give the defendant the benefit of any doubt as to whether the crime was manslaughter or murder. Finally, the trial court instructed the jury under CALJIC No. 8.74, that it had to agree unanimously as to whether any unlawful killing was murder of the first or second degree or manslaughter.

We conclude, in light of all the instructions given, that it is not reasonably likely the jury construed CALJIC Nos. 8.42 and 8.43 as creating a presumption that a homicide is murder and thereby lessening the prosecution's burden of proof.

Regarding the contention that CALJIC Nos. 8.42 and 8.43 improperly set the order of deliberations, defendant cites *People v. Kurtzman* (1988) 46 Cal.3d 322. In that case, our state's highest court held that "a [trial] court may restrict a jury from returning a verdict on a lesser included offense before acquitting on a greater offense, but may not preclude it from considering lesser offenses during deliberations." (*People v. Dennis* (1998) 17 Cal.4th 468, 536.) However, instructions that inform the jury it has to agree unanimously on a greater offense before considering a lesser offense have been held to be proper. (*People v. Hunter* (1989) 49 Cal.3d 957, 975-976.)

Here, the trial court instructed the jury with CALJIC No. 17.10, in addition to CALJIC Nos. 8.42 and 8.43. CALJIC No. 17.10, as provided to the jury, states in part, "[Y]ou are to determine whether the defendant is guilty or not guilty of the crime charged or of any lesser crime. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdict. . . ." Thus, the jury was explicitly told that it had

discretion with respect to the order in which it evaluated the charges and the lesser crime. We find no reasonable likelihood that CALJIC Nos. 8.42 and 8.43 led the jury to believe, contrary to the express statement in CALJIC No. 17.10, that it could not consider the lesser crime of manslaughter before making a finding on murder.

V. CUMULATIVE ERROR DOCTRINE

Defendant contends the cumulative effect of the alleged errors discussed *ante* deprived him of a fair trial. (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32 ["[u]nder the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial"].) However, we have found that no errors occurred at trial. Even if we label our assumed error regarding CALJIC No. 8.50 as an error, we have found that it was not prejudicial. Hence, there was no cumulative effect of multiple errors, the only situation in which the cumulative error doctrine applies.

VI. DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

GAUT
J.

MILLER
J.